88- 1837

Supreme Court, U.S.
FILED
MAY 12
JOSEPH F. SPANIOL,
CLERK

No. -

IN THE

Supreme Court of the United States

October Term, 1988

JOHN SMITH, *Petitioner.*

v.

JANE DOE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

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May 10, 1989

Central Publishing Company, Inc., Indianapolis, IN 46204

QUESTIONS PRESENTED

Do *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth* preclude a state court, under any and all circumstances, from taking into account, on a case by case basis, the interests of a father in his unborn child when the mother of the unborn child wants an abortion?

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PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

Petitioner John Smith[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Indiana Court of Appeals, entered in the above-entitled proceeding on October 24, 1988, which was refused review by the Indiana Supreme Court on February 9, 1989.

OPINIONS BELOW

The Order of the Indiana Supreme Court denying transfer of this case to itself is reprinted in the appendix hereto, p. 4a, *infra*.

[1] John Smith and Jane Doe are pseudonyms approved by the Indiana Court of Appeals. Under Indiana statutory law, and by order of the Indiana courts, the record of the trial court hearing has been sealed and pseudonyms employed. The parties are natural persons within the jurisdiction of Indiana courts.

The Memorandum Decision and Judgment of the Indiana Court of Appeals (not reported) is reprinted in the appendix hereto, p. 1a, *infra*.

The Findings of Fact, Conclusions of Law, and Order of the Vigo [County, Indiana] Circuit Court, Juvenile Division, *sub nom. in the Matter of Unborn Child H.*, is reprinted in the appendix hereto, p. 10a, *infra*.

JURISDICTION

Petitioner brought this action to establish himself as the father of the unborn child of Petitioner and Respondent and to obtain an injunction to prevent her from obtaining an abortion. A permanent injunction was issued by the Vigo Circuit Court.

The Indiana Court of Appeals, on October 24, 1988, reversed the judgment of the Vigo Circuit Court, which had been based on a consideration of both the Respondent's interests in obtaining an abortion and the Petitioner's interests in his unborn child. The Court of Appeals relied on two prior Indiana decisions in similar cases which held that the decisions of this Court in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), precluded any judicial consideration of the father's interests when a woman chooses to have an abortion.

On February 9, 1989, the Indiana Supreme Court denied transfer of this case to itself for review.

The jurisdiction of this Court to review the judgment of the Indiana Court of Appeals is invoked under 28 U.S.C. § 1257(3), based on the assertion by the Respondent of a right to abortion under the Fourteenth Amendment of the Constitution.

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT XIV

> SECTION 1. All persons born or naturalized in the United States . . . are citizens of the United States . . . . No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, 1.

STATEMENT OF THE CASE

On April 4, 1988, a young, unmarried man, John Smith (hereafter the "Father"), filed a Petition to Establish Paternity in the Vigo Circuit Court, Juvenile Division. He alleged that he was the father of Unborn Child H.,[2] who was approximately ten weeks of gestational age and was being carried by the young, unmarried mother, Jane Doe (hereafter the "Mother").

On the same date, the Father petitioned the court for an emergency hearing, alleging that the Mother had expressed an intention to abort their child. Also on that date, the Father moved the court for a Temporary Restraining Order, which was granted, restraining the Mother from obtaining an abortion for ten days.

A hearing was set for April 7, 1988, at which time evidence was presented and argument of counsel heard. At the beginning of the hearing, the Court renewed the Temporary Restraining Order, following questions as to the procedural propriety of the first order. The father and his three witnesses gave uncontroverted testimony. The Mother refused to participated in the hearing, beyond mere attendance, on the ground that the holding of this Court in *Roe v. Wade*, 410 U.S. 113, deprived the trial court of "jurisdiction" to consider either her decision to have an abortion or the Father's interests in his unborn child.

In a ruling dated April 8, 1988, the trial court issued its Findings of Fact, Conclusions of Law, and an order.

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[2] This case was styled *In the Matter of Unborn Child H.* in the trial court. In the Indiana Court of Appeals, the case was renamed *Jane Doe v. John Smith* by agreement of the parties and approval of the appellate court.

The trial court found that the Father was the natural, biological father of the unborn child.[3] In its Conclusions of Law, the trial court concluded that *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth* did not preclude the balancing of the Father's interests in his unborn child with the Mother's interests in aborting their unborn child. The trial court ordered that "[t]he Mother is hereby permanently restrained from having an abortion to terminate the unborn child she is now carrying . . . ." At the request of the parties, the final hearing on the paternity action was continued until after the birth of the child.

The Mother sought expedited review in the Indiana Supreme Court, seeking to have that court declare that the trial court was without jurisdiction because of the holdings of this Court in *Roe v. Wade*, 410 U.S. 113, and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, and that, if Jane Doe had already or should violate the permanent injunction of the trial court, she would not be found in contempt for such action.

Before the Indiana Supreme Court could consider the appeal, the Mother aborted their unborn child in knowing and willful violation of the court order, as admitted by the Mother in her Notice to the Indiana Supreme Court.[4] Consequently, expedited appeal was denied by the Indiana Supreme Court and the case was sent to the Indiana Court of Appeals for review.

In the Indiana Court of Appeals, the judgment of the trial court was reversed. The appellate court, in its Memorandum Decision, relied on two prior Indiana cases involving fathers' assertion of interests in abortion cases. The cases, *Conn v. Conn*, 525 N.E.2d 612 (Ind. Ct. App. 1988), *aff'd and opinion*

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[3] Further findings of the trial court are discussed *infra* in the Reasons for Granting the Writ.

[4] Despite the fact that the abortion has already occurred, this case is clearly within the exception to the mootness doctrine for matters "capable of repetition yet evading review," as that doctrine is employed in abortion cases. *Roe*, 410 U.S. at 125. In both *Roe* and *Doe v. Bolton*, 410 U.S. 179, 187 (1973),

(footnote continued)

of app. ct. adopted by order, No. 73S01-8807-CV-631 (Ind. July 15, 1988), *cert. denied*, 57 U.S.L.W. 3347 (U.S. Nov. 14, 1988) (No. 88-347), and *Doe v. Smith*, 527 N.E.2d 177 (Ind. 1988), relied on this Court's decisions in *Roe v. Wade*, 410 U.S. 113, and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, to hold that such a consideration of the fathers' interests violated the constitutional rights of the pregnant women involved.

Thus, the Indiana appellate courts' interpretation of the scope of a woman's constitutional right to abortion set forth in *Roe* and *Danforth* precluded the recognition of John Smith's interests in his unborn child. As noted above, this federal constitutional issue was the central focus of this case at every stage.

REASONS FOR GRANTING THE WRIT

I. The question of the appropriate consideration of a father's interests in his unborn child is an important one affecting millions of fathers.

This case presents a matter of great public importance. In every case where a woman seeks an abortion, there is a father

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Footnote 4 continued

this Court granted review of cases to women who had already completed their pregnancies. As explained by Justices Scalia and O'Connor, concurring in the recent case of *Honig v. Doe*, 108 S.Ct. 592 (1988), abortion jurisprudence "differ[s] from the body of our mootness jurisprudence . . . in dispensing with the same-party requirement entirely, focusing instead upon the great likelihood that the issue will recur *between the defendant and the other members of the public at large* without ever reaching us." *Id.* at 609 (emphasis in original). In the instant case, the same principle is applicable. Although the Father and the Mother may never again have occasion to litigate between them her right to abortion, there is at least as great a possibility that she will again be subject to such an action or that he will again seek to initiate such an action in relation to another partner as there was that Jane Roe would again be subject to the strictures of Texas abortion laws in *Roe*. In the public, a substantial number of such cases have occurred. With some million and a half abortions per year in the United States, the interests of many other fathers are at issue in cases with fact situations similar to the case at bar, which never come to court because of holdings such as that by the Indiana Court of Appeals in this case. This is a matter of great public importance concerning an unsettled area of the law which requires resolution by this Court.

of the child involved. Over one and a half million abortions are performed annually in this country. In each of these cases, the interests of fathers in their children are potentially at stake. Of course, actions such as the present one would only be undertaken by a father with notice of the mother's intent to abort and who wished to assert his interests.

However, *Roe* and *Danforth* are viewed by the Indiana courts to have forever barred from the courthouse fathers who would assert interests in their unborn children. And they are barred under any set of facts. Regardless of the mother's motivation, whether it be gender selection of her child, revenge or blackmail against the father, or some immature and near-frivolous reason — as in the case at bar — she may obtain an abortion without any consideration of the father's interests. It matters not what pledges she has made to him concerning the child, nor the degree of bonding already occuring between the father and child, nor his resources for providing for the child when born, nor the length of time she has carried the child, nor any other reason. She may have, under the Indiana courts' interpretation of the current state of abortion law in this country, an abortion virtually on her demand throughout pregnancy, with no consideration of his interests. Even in a situation where an unborn child is the only child that the father had ever procreated and would be able to procreate and where the interests of the mother in aborting the child are comparatively much weaker, the Indiana appellate courts, relying on *Roe* and *Danforth*, have declared that her right is absolute as against the father.

No comparable grant of authority exists elsewhere in the law: rather, where powerful interests compete, they are universally balanced. In a society adhering to the principle of "equal justice under the law," such absolute, unreviewable power is unjust.

As a result, fathers are disenfranchised from the judicial system. Counsel for Petitioner have had numerous requests from fathers about the country, wanting to know if their interests may be considered in abortion cases. The answer, at least

in Indiana, has to be that fathers' interests can no longer be considered.

Because the bonding process begins before birth, this answer is distressing to fathers frantic to save the lives of their unborn children. But the Indiana appellate courts, relying on an erroneous interpretation of *Roe* and *Danforth*, have slammed the doors on fathers seeking to exercise one of the most powerful biological and psychological desires of all, the desire to protect one's children. This desire, long exalted by society in its ideal portrayals of fatherhood and celebrated nationwide on Father's Day, is consigned to the judicial dustbin by the Indiana appellate courts. This result was viewed by the Indiana appellate courts as compelled by *Roe* and *Danforth*.

As noted below, the question of whether paternal interests may be considered in the abortion context was not resolved by *Danforth*, and, if it was, it was resolved unjustly. This national tragedy of uniform denial of fathers' interests in the abortion context needs to be considered by this Court. It needs to be made clear that the Constitution of the United States does not preclude the judicial consideration of both the fathers' interests and the mothers' interests.

II. Based on this Court's decisions in *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth*, the Indiana Court of Appeals erroneously determined that the interests of the father of an unborn child may receive no judicial consideration when the mother of the unborn child desires to obtain an abortion.

The Indiana Court of Appeals, following prior holdings by itself and by the Indiana Supreme Court, which in turn relied on *Roe* and *Danforth* for the proposition that it is unconstitutional to consider a father's interests in an abortion context, reversed the trial court. Petitioner contends that this judgment is based upon an erroneous understanding of *Roe* and *Danforth*, and, if not, then *Roe* and *Danforth* are themselves erroneous.

A. The State has an interest in protecting the interests of fathers in their unborn children.

A father is the biological contributor of half of an unborn child's genetic material. He thus has a powerful biological tie to the unborn child. It is his child as well as the child of the mother. This biological tie creates powerful psychological and emotional bonds. A good father loves his children, desires to protect and provide for them, desires their companionship, wants to care for them, and desires to guide their education and general rearing to assure that they fulfill their greatest potential. As a society we laud good fathers and encourage young men to develop these nurturing attributes. Legally, we enforce the minimal obligations on those fathers who do not live up to this societal ideal. Society has a strong interest in promoting the ideal of fatherhood, so that there will be another generation to continue our culture and so that the next generation is cared for.[5]

Thus, when fathers seek to protect their children from peril, whether the children are born or unborn, and to provide for them, society — and the courts — should encourage such attitudes. In an era of increasing strains on traditional parent/child and family relationships, the desire of a state to promote the ideals of fatherhood become especially compelling. Indiana courts have sought to do this, but have felt restrained by *Roe* and *Danforth*.

Society also has a strong interest in protecting the interests of its citizens. The traditional means of protecting such interests has been by judicial action. Yet, if the Indiana Court of Appeals' interpretation of *Roe* and *Danforth* is correct, the interests of a whole class of citizens, fathers of unborn children, are completely disregarded.

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[5] Of course, society has a powerful interest in promoting the ideal of nurturing mothers, as well, for similar reasons. Petitioner would argue that the current practice of abortion on demand is antithetical to such societal interests.

Society has a further interest in peaceful resolution of competing interests. Again, this is normally done in the courts. As a society, we do not want people to take matters into their own hands so that might makes right. Rather, we have agreed to be ruled by law, under the principle of "equal justice under the law." To lock the court doors to the interests of all fathers of unborn children is to make a mockery of the rule of law and equal justice and to invite nonpeaceful, private resolution of disputes over competing interests. This flies in the face of our tradition of liberal democracy under law.

The power of a father's interests in the care, custody, control, and companionship of his child is demonstrated by the fact that, as against the state, his interests constitute fundamental rights, which may not be abridged absent compelling, countervailing, state interests. *Stanley v. Illinois*, 405 U.S. 645 (1972). The state interests in protecting the interests of its citizens and in resolving disputes over competing interests peacefully are equally powerful: indeed, they are essential to our scheme of ordered liberty.

Therefore, the state of Indiana has an interest in considering and protecting the interests of fathers, and particularly of the Petitioner herein, where constitutionally permissible and equitably appropriate. This interest of the state logically extends to the protection of the interests of fathers in their unborn children where equitably justified. This Court should state that there is no constitutional bar to such consideration of a father's interests in appropriate circumstances.

B. The State's interest in protecting the interests of fathers in their unborn children becomes compelling in certain fact situations.

The constitutional analysis employed by this Court in abortion jurisprudence, from *Roe* to the present, has been a substantive due process analysis. Under this analysis, where a right has been found fundamental, the state must show that it has a compelling interest to support any legislation affecting the right, and that the legislation is narrowly tailored to effect only that compelling interest. *Roe*, 410 U.S. at 155.

In the sort of case by case judicial consideration which the Father and Mother received in the Vigo Circuit Court, the narrowly tailored aspect of the test is satisfied. Trial courts are skilled at resolving the common assertions of competing interests as occur regularly in dissolution and custody actions and will act in the most narrowly tailored fashion possible to protect compelling interests and eliminate those which do not rise to the level of being compelling.

In certain circumstances, a state's interest in protecting the interests of fathers in their unborn children rise to the level of being compelling. In such cases, Petitioner asserts that neither *Roe* nor *Danforth* preclude such protection, but that, if this Court finds that they do, then *Roe* and *Danforth* require reconsideration with regard to the proper protection of the interests of the father.

1. Under *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth*, the consideration of paternal interests is appropriate.

a. The right to abortion is not absolute.

In *Roe*, this Court held that the right to abortion is not absolute, 410 U.S. at 153-54. Rather, it is a qualified right "and must be considered against important state interests." *Id.* In addition, the *Roe* Court explicitly declared that it was not considering one of those important state interests, namely paternal rights. *Id.* at 165 n. 67.

b. *Danforth* did not preclude all consideration of paternal rights.

Contrary to the position taken by the Indiana appellate courts, this Court did not preclude all consideration of paternal rights in *Danforth*. The situation in *Danforth* is clearly distinguishable from the case at bar.

First, *Danforth* did not involve judicial consideration of competing interests on a case by case basis. Rather, it dealt with a state statute that gave all husbands an absolute veto, for any or no reason, to the blanket exclusion of their wives. The hus-

band, who might not even be the father, had a unilateral power to forbid an abortion by his wife, for any or no reason, which could not be controverted or reviewed by any higher authority. 428 U.S. at 69, 71. Because the statute required the husband's consent in all cases, the wife could not get an abortion even if her husband could not be located. *Id.* at 69. The state assumed lack of consent by all husbands unless they stated otherwise.

Faced with a statute which permanently and absolutely struck the balance of interests in favor of the husband in every case, this Court held that a "State may not constitutionally require the consent of the spouse, as is specified under [the Missouri statute], as a condition for abortion during the first 12 weeks of pregnancy," *Id.* Thus, this Court struck down a *per se* rule, not case by case consideration of competing interests.[6]

The majority opinion in *Danforth* was careful to clarify, in responding to the dissent by Justice White, that it was not considering the constitutionality of a more nuanced approach, which would allow for case by case consideration of a father's interests in his child. Justice White criticized the Court's decision, claiming that:

> the majority finds in the United States Constitution a rule that the State *must* assign greater value to a mother's decision to cut off a potential human life by abortion than to a father's decision to let it mature into a live child.

Danforth, 428 U.S. at 93 (White, J., dissenting) (emphasis added).

The majority responded:

> This section does much more than insure that the husband participate in the decision whether his wife should have an

[6] At one point, this Court could be misinterpreted to have engaged in balancing. In considering the Missouri spousal consent statute, this Court said: "Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor," *Danforth*, 428 U.S. at 71. This Court, however, was comparing the effect of leaving the statutory, *per se*, absolute veto intact in every case with the effect of striking it down and leaving the woman free to "act unilaterally." Given the choice between these absolutes, the Court held the rights of the woman must prevail.

> abortion. The state, instead, has determined that the husband's interest in continuing the pregnancy of his wife *always outweighs* any interest on her part in terminating it irrespective of the condition of their marriage. The State, accordingly, has granted him the right to *prevent unilaterally, and for whatever reason*, the effectuation of his wife's and her physician's decision to terminate her pregnancy. This state determination . . . has interposed an absolute obstacle to a woman's decision that *Roe* held to be constitutionally protected from such interference.

Id. at 70-71 n. 11 (emphasis added).

A comparison of the absolute spousal veto rejected in *Danforth* and the judicial inquiry engaged in by the trial court below clearly demonstrates that *Danforth* does not apply to this case.

Danforth described the Missouri statute as having "delegate[d] to a spouse a veto power," which was "delegated authority to a particular person . . . to prevent [an] abortion." *Id.* at 69.

In the instant case, the trial court did not propose to delegate to anyone a "veto power" or to "delegate authority" to the spouse to prevent the abortion. On the contrary, it was the trial court itself which was to weigh the interests of both parties to determine whether or not an abortion should occur.[7]

In addition, it cannot be said that a judicial inquiry is "unilateral," as the *Danforth* Court described the Missouri spousal veto. *Id.* at 70. The judicial inquiry herein is conducted as an adversary proceeding in which both the interests of the mother and the interests of the father would be considered.

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[7] That this Court does not consider a judicial rejected of an abortion decision, under proper circumstances, to be an unconstitutional "veto" is made clear by its opinions relating to parental rights when a minor is seeking an abortion. In *Danforth*, this Court also struck down an "absolute veto" right in parents. *Id.* at 72-79. If this also rejected judicial involvement as well, the question of parental involvement would have been settled in *Danforth*. This, however, is not the case. In subsequent cases, this Court has upheld, both in principle and in fact, state statutes which require a minor to seek parental or judicial consent to an abortion. *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 409-93 (1983). In so doing, this Court rejected the view of the

(footnote continued)

Nor does the trial court below suggest that the father's interest in continuing the pregnancy always outweighs any interest on the mother's part in terminating it, as the Missouri spousal veto statute would have done. *Id.* at 70 n.11. On the contrary, the trial court proposed to weigh the interests of both parties, with the relative weight of the interests to determine the outcome.

In sum, *Danforth* does not control the present case, as it did not consider whether, on a case by case basis, the interests of a father could be considered along with the interests of a mother, as sought in the case at bar.

3. Under a compelling interest analysis, in certain situations a man's interest in his unborn child must be considered compelling.

In some circumstances, the interests of a father in his unborn child (and the interest of the state in protecting his interests) must be considered compelling, so as to justify abridgment of the mother's right to choose an abortion.

While exploration of all the possible situations in which this could be possible is beyond the scope of the present writing, an example is appropriate. In his dissent to *Danforth*, Justice White (joined by Justice Rehnquist) suggests one situation where a father's interest could be found compelling:

> [T]he state is not . . . delegating to the husband the power to vindicate the *State's* interest in the future life of the

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Footnote 7 continued

dissenters that "a parental or *judicial veto* of a minor's decision to obtain an abortion . . . [is] unconstitutional." *Id.* at 504 (Blackmun, J., dissenting) (emphasis added). The requirement of parental or judicial consent was supported, in part, by the right of parents to "the custody, care and nurture" of their children — the very interests at stake in the present case, *Bellotti v. Baird (II)*, 443 U.S. 622, 638 (1979). By providing a judicial forum for the minor to seek authorization for abortion without parental consent, the statute did not "give a third party an absolute, and possibly arbitrary, veto . . . regardless of the reason for withholding the consent." *Id.* at 643. This is so even though the court could refuse consent to the abortion for the minor, if the court found that the desired abortion was not "in her best interests." *Id.* at 644.

> fetus. It is instead recognizing that the husband has an interest of his own in the life of the fetus which should not be extinguished by the unilateral decision of his wife. [footnote omitted] It by no means follows, from the fact that the mother's interest in deciding "whether or not to terminate her pregnancy" outweighs the *State's* interest in the potential life of the fetus, that the husband's interest is also outweighed and may not be protected by the State. A father's interest in having a child — perhaps his only child — may be unmatched by any other interest in his life.

Danforth, 428 U.S. at 93 (White, J., dissenting) (emphasis in original).

In such a situation, where the unborn child was the only child of the father, and perhaps, because of subsequent physical impairment of his reproductive capability, would be his only child, the father's interest would be a powerful one. If such a powerful interest were coupled with relatively weaker reasons asserted by the Mother for desiring an abortion, *e.g.*, the child was to be a girl and she wanted a boy, the interest of the father would have to be considered compelling and rightly protectable by the courts.

However, the Indiana Court of Appeals, relying on *Roe* and *Danforth*, precluded any such possibility. Therefore, this Petition should be granted to establish that, at least in some cases, a father's interests may be found compelling and judicially protected.

4. Under an unduly burdensome or rational basis test, a State may also protect a father's interests in his unborn child in certain circumstances.

If this Court should reject the substantive due process analysis of *Roe*, together with its requirement of a compelling state interest, it seems readily apparent that the same arguments set forth above would allow judicial consideration of paternal interests under any other standard this Court might adopt, *e.g.*, "unduly burdensome," or under the generally applicable

"rational basis" test. At a minimum, if the Court decides, in the near future, to adopt one of these tests as its standard of review for abortion cases, this case should be remanded to the Indiana Court of Appeals for reconsideration in light of the changed standard of review.

C. In this case, the State's interest in protecting the interests of the Petitioner in his unborn child were compelling and were appropriately protected by the trial court.

In the case at bar, Indiana's interest in protecting the interests of the Father in his unborn child was compelling. This is evident from a review of the findings of fact of the trial court.

The Father, in this case, has[8] developed a strong bond with the unborn child[9] and would suffer irreparable harm if she were aborted. The Father deeply loves the Mother and wants to spend the rest of his life with her. They have discussed marriage and planned to be married one day and have children. However, because of his strong feelings about his child, the Father would feel compelled to end their relationship if the Mother obtains the abortion. This fact illustrates the Father's deep attachment to the child and the depth of the grave distress and psychological burden that he would suffer were the child aborted. His family is already looking forward to the addition of a grandchild. The Father and the Mother have discussed names for the unborn child. It is to be named after him, if a boy, or after her, if a girl (with his mother's name for a middle name). Findings of Fact 6, 7, Record 42, 147, 150-51, 155, 158-59.

Initially, the couple excluded sexual relations from their relationship. When they began having sexual relations, they initially took measures to prevent conception. This was ended at the Mother's request. The Mother is familiar with contracep-

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[8] The events are necessarily presented prospectively although, of course, they have already transpired.

[9] To avoid the awkward inclusion of both male and female pronouns to refer to the unborn child, the use of the female pronoun will be adopted herein.

tive measures, having previously employed several of them, but chose not to use them in her sexual relations with the Father. Findings of Fact 4, 5, Record 42, 136, 139-41.

The record further demonstrates that the Father is willing and able to provide the necessary support and care for his child, and has offered to marry the Mother and raise their child together. He has even offered to take full custody and responsibility for the child upon birth and is willing and able to pay all necessary expenses related to prenatal care and childbirth of their child. Findings of Fact 7, 8, Record 42.

Balanced against these interests are the interests of the Mother. The Mother has expressed a desire for an abortion because she does not want to share the Father with anyone. Finding of Fact 14. However, the Father feels that he could not continue their relationship if she obtains an abortion. As the Father is willing to take custody of the child, the Mother would not have to share any future boyfriends with the child should the current relationship not work out. Finding of Fact 14.

The Mother has expressed a desire for an abortion because she wants to look nice in a bathing suit during the summer, and not to be pregnant during the summer because of her social plans. Finding of Fact 14. Balanced against the Father's powerful interests in the care, custody, control, and companionship of his child, this is a relatively insubstantial consideration, bordering on the frivolous.

The Mother has expressed a desire for an abortion because she does not want to undergo the discomfort of childbirth. Finding of Fact 14. However, she has stated that she does hope to have children some day, which lessens this concern as a factor — it becomes, instead, a matter of timing. Further, there is discomfort associated with abortion. Balanced against the parental and procreational interests of the father, this is a relatively insubstantial consideration.

Additionally, the Mother has expressed no interest in further schooling or employment, but, were she to do so, the child would not be present to hinder or prevent her plans in any way,

since the Father is willing to take custody of and provide full support for the child. The Mother has no other children, nor are there any others living at home with her mother, with whom she lives. Thus, there will be no unwanted child and no overburdening of any already existing family structure. Also, the stigma of unwed motherhood has diminished dramatically since 1973, when *Roe* was decided, and there is no evidence that the Mother in this case would be conscious of such a stigma. Findings of Fact 12-15.

The trial court took all these factors into consideration when it issued the permanent injunction against the performance of the abortion. On balance, the court properly found the Father's interests in his child in this particular case far outweigh the Mother's interest in abortion.

On the basis of these considerations, it may be seen that this Court may uphold the judgment of the trial court on the basis that the state had a compelling interest in protecting the interests of the Father in his child which made the abridgment of her choice of abortion appropriate. Because of the erroneous interpretation of this Court's holdings in *Roe* and *Danforth*, the Indiana appellate courts were precluded from affirming the trial court, as well.

This Court should accept this case for review to correct the erroneous notion that *Roe* and *Danforth* preclude the consideration of paternal rights in cases involving competing interests relating to abortion, and that, in appropriate cases, the interests of a father may be found compelling.

CONCLUSION

WHEREFORE, Petitioner John Smith respectfully requests this Court to issue a writ of certiorari to review the decision of the Indiana Court of Appeals.

Respectfully submitted,

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State of Indiana

CLERK OF THE SUPREME COURT
COURT OF APPEALS AND TAX COURT

SEAL

INDIANAPOLIS, 46204

DANIEL ROCK HEISER, CLERK
217 STATE HOUSE

TELEPHONE 317-232-1930

JAMES BOPP JR.
191 Harding Avenue
P.O. Box 410
Terre Haute, IN 47808-0410

[list of counsel omitted]

Cause Number
84A01-8804-CV-00112
LOWER CAUSE
84CO18804JP00185

JANE DOE

v.

JOHN SMITH

You are hereby notified that the COURT OF APPEALS has on this day October 24, 1988, issued the enclosed opinion.

WITNESS my name and the seal of said Court, this 24th day of October, 1988

/s/ Daniel Rock Heiser
Clerk Supreme Court,
Court of Appeals and Tax Court

IN THE
COURT OF APPEALS OF INDIANA
FIRST DISTRICT

JANE DOE,	)	
	)	
Defendant-Appellant,	)	
	)	
vs.	)	No. 84A01-8804-CV-00112
	)	
JOHN SMITH,	)	
	)	
Plaintiff-Appellee.	)	

APPEAL FROM THE VIGO CIRCUIT COURT
JUVENILE DIVISION
The Honorable Robert H. Brown, Judge
Cause No. 84C01-8804-JP-185

RATLIFF, C.J.

MEMORANDUM DECISION

At the instance of the putative father, the trial court issued an injunction permanently enjoining Jane Doe, an unmarried pregnant woman, from obtaining an abortion to terminate her pregnancy which was then in the first trimester. Doe appeals from the issuance of such injunction. We reverse.

Both parties argue this case is not moot although it is conceded that Doe, in disobeyance of the injunction, obtained the abortion. The parties contend this case falls within the well recognized exception to the mootness doctrine of a matter of great public importance and likely to recur and yet evade review. *See, e.g., Indiana Educ. Employment Relation Bd. v. Mill Creek Classroom Teachers Assn'n* (1983), Ind., 456

N.E.2d 709; *Haggerty v. Bloomington Bd. of Pub. Safety* (1985), Ind. App., 474 N.E.2d 114. In addition, Smith contends that the case is not moot because Doe is still subject to contempt proceedings for violating the injunction.[1] For the purposes of this opinion, we will assume that this case is not subject to dismissal as being moot.

The issues presented in this case were decided in favor of Doe's position in *Conn v. Conn* (1988), Ind., 526 N.E. 2d 958 (Pivarnik, J., dissenting) wherein our supreme court adopted our opinion in *Conn v. Conn* (1988), Ind. App., 525 N.E.2d 612; and *Doe v. Smith* (1988), Ind., 527 N.E.2d 177 (Pivarnik, J., dissenting). Those cases are controlling here.[2] The issuance of the injunction was error.

Judgment reversed.

ROBERTSON, J. and NEAL, J., concur.

---

[1]Doe argues she has a continuing legal interest because of the likelihood of a contempt proceeding. She also contends she cannot be adjudged in contempt because the trial court had no jurisdiction to issue the injunction and because the injunction was "transparently invalid." She cites, among other cases, *Walker v. City of Birmingham* (1967), 388 U.S. 307, 87 S. Ct. 1824, 18 L. Ed. 2d 1210. No issue of contempt being before us in this action, we decline to express an opinion on that issue.

[2]Counsel for Smith argues that *Conn v. Conn*, *supra*, was wrongly decided. We do not agree. Further, as counsel should know, it is not within our power to overrule our supreme court or to ignore its pronouncements which are binding on us.

State of Indiana

CLERK OF THE SUPREME COURT AND COURT OF APPEALS

SEAL

INDIANAPOLIS, 46204

DANIEL ROCK HEISER, CLERK
217 STATE HOUSE

TELEPHONE 317-232-1930

No. 84A01-8804-CV112
JANE DOE

VS.

JOHN SMITH

You are hereby notified that the Supreme Court has on this day Appellees petition for transfer is hereby Denied.
Randall T. Shepard, Chief Justice.
All Justices Concur. TS

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 9th day of February, 1989.

/s/ Daniel Rock Heiser
Clerk Supreme Court and
Court of Appeals

No. _____

Richard E. Coleson

I hereby acknowledge receipt
of the above notice

_____
Signature

Date _____, 19 _____

Attorney for ☐ Appellant
☐ Appellee

VIGO CIRCUIT COURT
1988 TERM

IN THE MATTER OF THE
UNBORN CHILD [H] NO. 84C01 8804 JP 185

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT

The Court, having heard the evidence and being duly advised, now makes the following findings of fact:

1. The Petitioner, [John Smith], age 24, gave credible testimony, none of which was controverted.

2. [Witness One, Witness Two, and Witness Three], each gave credible uncontroverted testimony.

3. The evidence is clear and convincing that the Petitioner is the father and the Respondent, [Jane Doe], is the mother of a child conceived out of wedlock during the latter part of January, 1988 or the early part of February, 1988.

4. That the Respondent's last menstrual period ended during the last part of the second week of January, 1988, immediately following which until April 3, 1988, the parties herein engaged in many, many acts of sexual intercourse. The last such act occurring the day immediately preceding the institution of this litigation.

5. Respondent was familiar with some methods of birth control having in the past used the "pill" and with condoms, as indicated by the use of condoms by Petitioner the first two or three acts of sexual intercourse with Respondent. After a few occasions, at the request of the Respondent, coitus interruptus was discontinued after two or three occasions immediately after the discontinuance of the use of condoms by the parties.

6. After being medically assured of the fact of pregnancy, the parties discussed between themselves names for the

expected child; Petitioner's name in case of a male child and perhaps [Jane], after Respondent and with the middle name [ ] being taken from the name of the Petitioner's mother, if the expected child were female.

7. Petitioner is anxious to and capable of caring for the expected child and has numerous promises of assistance, if needed, from both of his parents as well as many other of his family members.

8. Petitioner is in love with Respondent.

9. There is no evidence that any physician has made a decision based on his or her medical judgment that an abortion should be had by the Respondent.

10. There is no evidence of any harm, medically diagnosed or otherwise that would befall the Respondent if she gave birth to the child she now carries.

11. There is no evidence that maternity may force upon the Respondent either a distressful life or future.

12. The Respondent, not being in school, being unemployed, and intending to remain that way, and intending to continue living with her mother, the continuance of her pregnancy would not interfere with either her employment or education.

13. There is no evidence that the mental or physical health of the Respondent may in any way be taxed by child care.

14. There is no evidence of distress for concerned persons associated with this child except that the Respondent wishes to avoid childbirth, she wishes to look nice in a bathing suit this summer, her desire not to be pregnant in the **summertime**, and her desire not to share the petitioner with the baby.

15. There is no evidence that the Respondent would be stigmatized by unwed motherhood.

16. There is no evidence that a responsible physician has considered or discussed the above or any other factors in consultation with the Respondent.

17. There is no evidence that the child would be brought into a family already unable, physically or otherwise, to care for him or her. Au contraire, the Court finds the petitioner both able and willing to provide a suitable home for the child.

18. The appearance and demeanor of the Respondent in the courtroom, as observed by the court, indicated that she is a very pleasant young lady, slender in stature, healthy, and well able to carry a baby to delivery without an undue burden.

CONCLUSIONS OF LAW

1. Indiana Code 31-6-6.1-2(a)(2) (A paternity action may be filed by . . . a man alleged . . . that he is the expectant father of an unborn child) confers jurisdiction on this court to entertain this Petition to Establish Paternity.

2. The evidence is clear and convincing that the Petitioner has standing to request injunctive relief (Indiana Rules of Court, TR 65).

3. The Petitioner is the father and a fit and proper person to have the care and custody of the child herein.

4. Indiana law is clear that fathers have rights to have children, including the right to have the care and custody thereof.

5. Balancing the rights of the mother with the rights of the father is certainly an appropriate judicial function when such rights are in conflict.

6. There are no Indiana statutes covering the issues here involved.

7. The rights of fathers are derived from the common law in Indiana and not from state action.

8. The 14th Amendment to the United States Constitution applies only to state action. Roe v. Wade, 410 US 113, (1972).

9. The Order of this Court, enforcing the rights of the father, does not constitute state action.

10. The balancing of the rights of the father to have his unborn child with the rights of the mother to abort, on the basis

of the facts found above, in this particular case, the rights of the father outweigh the rights of the mother.

11. The rights of the father in his unborn children are of constitutional dimensions under the 14th and 9th Amendments to the United States Constitution as well as being derived from the Indiana common law. Those constitutional rights of the father outweigh the constitutional rights of the mother.

12. Planned Parenthood of Missouri vs. Danforth, 428 US 52, (1975), involved a state statute and a marriage relationship, neither of which are here involved and accordingly is not dispositive of the instant case.

13. Factors considered in Roe v. Wade do not exist here where the mother was relying on abortion rather than conception. That fact, and her other reasons for abortion are indicative of an extremely immature young woman which lessens the weight and nature of her privacy interest. See Findings of Fact Numbered 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18.

14. The interests of the father not having his child born are cognizable, substantial, and enforceable rights.

ORDER

Upon the basis of the Court's Findings of Facts and Conclusions of Law, the Court hereby Adjudges, Orders and Decrees that:

(a) The mother is hereby permanently restrained from having an abortion to terminate the unborn child she is now carrying;

(b) The Mother is ordered to provide a copy of this Court's Order to any physician, abortion clinic, abortion facility, or pregnancy counseling organization, or any employee thereof, which she might consult regarding her unborn child or the termination of her pregnancy;

(c) any physician, abortion clinic, abortion facility, or pregnancy counseling organization, or employee thereof, with notice of this Order, is hereby restrained from performing an abortion on the Mother;

(d) nothing in this Order shall prohibit the termination of the Mother's pregnancy in a medical emergency in a circumstance which precludes prior resort to this Court;

(e) the Father is ordered to pay for all reasonable and necessary medical expenses for the Mother and the unborn child related to the prenatal care, child birth and delivery of the unborn child;

(f) this Order shall terminate two weeks after the spontaneous abortion, an induced abortion under paragraph (d) of this Order, or delivery of the unborn child herein;

(g) the final hearing in this cause shall be continued until after the birth of the unborn child herein;

(h) the parties shall promptly notify the Court of the spontaneous abortion, an induced abortion under paragraph (d) of this Order, or the delivery of the unborn child herein;

(i) this is a final judgment and Order with respect to all the paragraphs of this Order, except paragraphs (e) and (g);

(j) the parties and their counsel are hereby restrained from public disclosure of the identities of the parties, the unborn child, and witnesses in this case; and

(k) upon any appeal of this Order, the captions of the cause shall be In the Matter of the Unborn Child H. and all reference to the names of the parties, the unborn child and witnesses shall be deleted.

Ordered and decreed this 8th day of April, 1988.

/s/ Robert Howard Brown
Robert Howard Brown, Judge

VIGO CIRCUIT COURT
1988 TERM

IN THE MATTER OF THE
UNBORN CHILD [H] NO. 84C01 8804 JP 185

ORDER

The Court now amends its Conclusions of Law so that Item 8 now reads: The 14th Amendment to the United States Constitution applies only to state action. Roe v. Wade, 410 US 113, (1972).

Item 11 is amended to read: The rights of the father in his unborn children are of constitutional dimensions under the 14th and 9th Amendments to the United States Constitution as well as being derived from the Indiana common law. Those constitutional rights of the father outweigh the constitutional rights of the mother, on the basis of the facts found above in this particular case.

Item 13 is amended to read: Factors considered in Roe v. Wade do not exist here where the mother was relying on abortion rather than conception. That fact, and her other reasons for abortion are indicative of an extremely immature young woman which lessens the weight and nature of her privacy interest. See Findings of Facts Numbered 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18.

SO ORDERED, this 11th day of April, 1988.

/s/ Robert Howard Brown
Robert Howard Brown, Judge

No. 88-1837

FILED
JUN 10 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN SMITH,

Petitioner,

—v.—

JANE DOE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE INDIANA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a court may issue a permanent injunction prohibiting a woman from having an abortion, upon a motion by a man claiming to have caused the woman's pregnancy.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1837

JOHN SMITH,

Petitioner,

—v.—

JANE DOE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE INDIANA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Jane Doe submits this brief in opposition to the petition for a writ of certiorari filed by John Smith, which seeks review of the judgment entered by the Indiana Court of Appeals in this action, *Jane Doe v. John Smith*, No. 84A01-8804-CV-00112 (Ind. Ct. App. Oct. 24, 1988). P.A. 1a-3a.[1] Mr. Smith's petition fails to establish any of the factors that would support review on a writ of certiorari. The Indiana Court

1 Citations to documents contained in the record on appeal will be to the record page number in the form R. _____; to the Petition for a Writ of Certiorari as Pet. _____; to the Appendix to the Petition for a Writ of Certiorari as P.A. _____; and to the Appendix to Respondent's Brief in Opposition as R.A. _____. In the Indiana Court of Appeals, pseudonyms were substituted for the names of the parties in order to protect their privacy, although actual names were used in the original petition and order. The record of the trial court hearing has been sealed.

of Appeals properly applied this Court's prior decisions, which are dispositive. Moreover, no conflict exists among state or federal appellate courts as to the proper resolution of the question presented in this case. *See* Sup. Ct. R. 17.

COUNTERSTATEMENT OF THE CASE

On April 4, 1988, the Juvenile Division of the Vigo Circuit Court (the "juvenile court") in Terre Haute, Indiana issued a Temporary Restraining Order ("TRO"), without notice or hearing, ordering Jane Doe not to terminate her first trimester pregnancy. R. 14; R.A. 1a.[2] The TRO also ordered "any abortion clinic, abortion facility, employee thereof, and any physician to restrain from performing an abortion upon Jane Doe." *Id.* Accompanying the restraining order was an "Order To Show Cause," requiring Ms. Doe to appear before the court, without protection of a pseudonym, to explain and defend her personal decision to terminate her pregnancy. The court issued the TRO solely upon the motion of John Smith, who initiated a paternity proceeding alleging that he was the prospective "father" of Ms. Doe's fetus and seeking a permanent injunction compelling Doe to bear his child.

Ms. Doe responded on April 5, 1988 with a Motion to Dismiss, citing her constitutional right to make her own decision

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2 This case is but one of a series of cases wherein counsel for the Petitioner, James Bopp, Jr., Esq., has represented men seeking to interfere with the decisions of individual women to have abortions. This Court has recently declined to consider these claims, *see Conn v. Conn*, 525 N.E.2d 612 (Ind. Ct. App.), *aff'd & opinion adopted*, 526 N.E.2d 958 (Ind.), *applications for stay denied*, No. A-88-55 (U.S. July 22, 1988) (letter from the Clerk of the Court), *cert. denied*, 57 U.S.L.W. 3347 (U.S. Nov. 14, 1988) (No. 88-347); *Myers v. Lewis*, No. 111440 (Mich. App. 1988), *application for stay denied*, 109 S. Ct. 28, *cert. denied*, 109 S. Ct. 391 (1988). In the Spring of 1988, Mr. Bopp produced and distributed a "Father's Rights Litigation Kit," a compilation of eleven model court papers for use in preventing women from obtaining abortions. *See* J. Bopp, R. Coleson, B. Balch and M. Spaulding, *Father's Rights Litigation Kit: Judicial Balancing of Paternal and Maternal Rights and Interests Where the Right of the Mother to Obtain an Abortion is Challenged by the Father* (1988).

about whether to have an abortion as recognized by this Court in *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). Ms. Doe also contended that Mr. Smith was not responsible for her pregnancy.

The next day, responding to a motion by Mr. Smith, the court ordered a man identified by Smith as Ms. Doe's physician to turn over all of Ms. Doe's medical records together with a "signed affidavit summarizing his testimony herein concerning the issues raised by this paternity action, the pregnancy of Respondent and any proposed termination of said pregnancy." R. 19; R.A. 3a. On April 6, Ms. Doe moved the juvenile court to rescind that order on the ground that it required the physician to divulge information that was protected by the physician-patient privilege and that the court lacked jurisdiction either to issue the order or to hear the original action. She also filed a supplemental motion to dismiss, arguing, in effect, that the Indiana paternity statute did not purport to authorize the issuance of the TRO and that if it did, it unconstitutionally deprived her of her constitutional right to end her pregnancy.

The juvenile court held an emergency hearing on April 7, 1988 to consider both Smith's paternity petition and his request for an injunctive order compelling Ms. Doe to carry her pregnancy to term. The court ruled that it had jurisdiction to conduct the proceeding and noted Ms. Doe's continuing objection to the court's jurisdiction. At the April 7 hearing, John Smith and three other witnesses testified in favor of the motion. Findings No. 1 and 2, P.A. 5a. Mr. Smith testified to the most intimate details of his relationship with Ms. Doe, and also described the reasons *he* believed Ms. Doe was choosing to have an abortion.

Three of Doe and Smith's acquaintances, none of whom had known Ms. Doe and Mr. Smith for more than six months, testified on Mr. Smith's behalf about intimate details of Mr. Smith's relationship with Ms. Doe. R. 94, 101, 111. Ms. Doe's physician was subpoenaed and the court ordered him to testify. Although the court held that the physician's testimony as to

most matters was inadmissible due to the physician-patient privilege, the court did allow him to introduce some privileged information. R. 164-173.

Ms. Doe, though present, objected to this invasive judicial proceeding as a violation of her constitutional right to privacy and refused to testify or present evidence on her own behalf. Ms. Doe's refusal was justified because the very nature of the proceedings undermined her privacy rights. Profoundly intimate and sensitive matters were explored at the hearing, ranging from the frequency and precise nature of Ms. Doe's sexual relations with Mr. Smith to the personal and sexual history of her sister. Findings No. 4 and 5, P.A. 5a; R. 31.

The court relied solely on Mr. Smith's testimony in making the unsubstantiated finding that:

> [T]he Respondent wishes to avoid childbirth, she wishes to look nice in a bathing suit this summer, her desire not to be pregnant in the summertime, and her desire not to share the petitioner with the baby.

Finding No. 14, P.A. 6a. In making his findings, the juvenile court ignored Mr. Smith's contradictory statements and testimony that illustrated his ignorance about what Ms. Doe thought of her situation. For example, Mr. Smith stated that Ms. Doe "didn't discuss with me very much about what the doctor said," R. 145; that Ms. Doe told him that she "can't have a child in her life, uh, that she's not ready for the responsibilities," R. 147; and that, with respect to the abortion decision, "we haven't discussed anything except my side." R. 152.

On April 8, the juvenile court entered its Findings of Fact and Conclusions of Law and Order, in which it permanently enjoined Ms. Doe from obtaining an abortion. R. 42-46; P.A. 5a-10a. In a highly irregular departure from accepted notions of judicially cognizable facts, the court found *inter alia*, that "[p]etitioner is in love with Respondent," Finding No. 8, P.A. 6a, that "[t]here is no evidence that maternity may force upon the Respondent a distressful life or future," Finding No. 11, P.A. 6a, and that Jane Doe "is a very pleasant young lady,

slender in stature and well able to carry to delivery without an undue burden." Finding No. 18, P.A. 7a. The court went so far as to hold that: "Factors considered in *Roe v. Wade* do not exist here where the mother was relying on abortion rather than conception [sic]. That fact, and her other reasons for abortion are indicative of an extremely immature young woman which lessens the weight and nature of her privacy interest." Conclusion No. 13, P.A. 8a.

Due to the obvious time pressures involved, Ms. Doe asked the Supreme Court of Indiana for expedited review of the permanent injunction against her. Before the Supreme Court of Indiana considered her appeal, however, Ms. Doe terminated her pregnancy and so informed the court. R.A. 4a-5a. Thereafter, the Supreme Court of Indiana denied the request for expedited hearing, and Ms. Doe brought her appeal in the Indiana Court of Appeals, First District. The Indiana Court of Appeals, in a memorandum decision, unanimously reversed the juvenile court's order. P.A. 2a-3a. On February 9, 1989, the Indiana Supreme Court denied Mr. Smith's petition for transfer, and refused to hear his appeal. P.A. 4a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS COURT'S PRIOR DECISIONS ARE DISPOSITIVE AND WERE PROPERLY APPLIED BY THE INDIANA COURT OF APPEALS

A. Every Woman Has A Constitutional Right To Decide Whether or Not To Terminate Her Pregnancy

The United States Constitution guarantees every woman the fundamental right to decide, free from government intrusion, whether to end her pregnancy. This Court first clearly recognized this right to choose abortion in 1973, *see Roe v. Wade*, 410 U.S. 113 (1973), and has since consistently and unequivocally reaffirmed the right in numerous decisions, *see, e.g., City of Akron v. Akron Center for Reproductive Health*, 462 U.S.

416 (1983); *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976). Most recently, the Court held that "[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986).

In 1976, this Court rejected the claim that the state may deprive a woman of her constitutional right to choose to have an abortion in order to promote the interests and wishes of her husband. *See Danforth*, 428 U.S. 52. The Missouri law at issue in *Danforth* prohibited a married woman from having an abortion without her husband's consent. The Court struck down that law and made clear that a woman's right to end an unwanted pregnancy may not be infringed on the basis of her husband's objections. *Id.* at 69-71.

Thus, this Court's decisions in *Roe* and *Danforth* are clearly dispositive. Moreover, every appellate court to consider the issue has held that a man may not obtain a court order enjoining a woman from exercising her right to decide to have an abortion.[3] This Court has just this term twice denied petitions

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3 This has been true in cases both where the man seeking the court order was the woman's husband, *Lewis*, No. 111440; *Conn*, 526 N.E.2d 958; *Coleman v. Coleman*, 57 Md. App. 755, 471 A.2d 1115 (1984); *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128 (1974), as well as where the man was not the woman's husband but claimed to be responsible for the woman's pregnancy, *John Doe v. Jane Smith*, 527 N.E.2d 177 (Ind. 1988), *applications for stay denied*, 108 S. Ct. 2136 (1988) (Stevens, J., in chambers), No. A-88-55 (U.S. July 22, 1988) (White, J.) (letter from Clerk of the Court); *Jane Doe v. John Smith*, No. 84A01-8804-CV-00112 (Ind. Ct. App. Oct. 24, 1988), *petition for cert. filed*, May 10, 1989 (No. 88-1837); *Jones v. Smith*, 278 So. 2d 339 (Fla. App. 1973), *cert. denied*, 415 U.S. 958 (1974). Courts consistently denied such requests even prior to *Danforth*:

> "[*Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973)] make crystalline . . . that a woman in the first trimester of pregnancy, in consultation with her physician, may elect to terminate the pregnancy, and neither the state nor the woman's spouse

(*footnote continued*)

for a writ of certiorari preventing this same question. *Myers v. Lewis*, No. 111440 (Mich. App. 1988), *application for stay denied*, 109 S. Ct. 28, *cert. denied*, 109 S. Ct. 391 (1988); *Conn v. Conn*, 525 N.E.2d 612 (Ind. Ct. App.), *aff'd & opinion adopted*, 526 N.E.2d 958 (Ind.), *applications for stay denied*, No. A-88-55 (U.S. July 22, 1988) (letter from the Clerk of the Court), *cert. denied*, 57 U.S.L.W. 3347 (U.S. Nov. 14, 1988) (No. 88-347).

Mr. Smith argues that *Danforth* is not dispositive because it involved a state statute giving all men the right to veto their wives' abortion decisions, whereas he is arguing for a case-by-case judicial determination of whether particular individual women can be forced to continue their pregnancies. This suggested distinction is irrelevant to Ms. Doe's constitutional rights at stake.[4] As the Court recognized in *Danforth*, "The obvious fact is that when the wife and the husband disagree on this decision, the view of only one of the two marriage partners can prevail." 428 U.S. at 71. Whether imposed by court order on a case-by-case basis or by state statute, the deprivation of a woman's constitutional right is equally complete, and the harm resulting from a court-ordered pregnancy and childbirth equally devastating.

Moreover, this Court has already rejected the case-by-case balancing of interests sought by Mr. Smith. The Court in *Danforth* expressly considered "the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying." 428 U.S. at 69. Nevertheless, the Court concluded that any balancing would be impermissible, because a woman's right to make the abortion decision outweighs her husband's

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nor the father of the child has any right to intervene so as to prevent her decision from becoming fact."

Coleman, 471 A.2d at 1119; *see also Doe*, 314 N.E.2d 128; *Jones*, 278 So. 2d 339.

4 Nevertheless, as discussed *infra*, the absence of a state statute here defeats Mr. Smith's claim that the state has a compelling interest that outweighs Ms. Doe's rights.

interests in each and every case: "Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor." *Id.* at 71. Recognizing the unparalleled importance of a woman's right to control her reproductive capabilities, the Court has declared that every adult woman has the right to decide to have an abortion and to effectuate that decision without government interference, regardless of her very personal reasons and without having to reveal those reasons.

The facts of this case illustrate the wisdom of this Court's consistent rejection of any proposed balancing of interests. Courts are ill-equipped to evaluate the ethical, religious, medical, and personal factors involved in the decision whether to have a child. *Cf. Doe v. Bolton*, 410 U.S. 179, 195-98 (1973) (abortion decision may not be subject to ad hoc determinations of hospital committee). In order to draw his conclusions of law, the trial judge relied on unconventional factual findings such as "Petitioner is in love with Respondent." In addition, he relied solely on the appearance of Ms. Doe in the courtroom to determine that "she is a very pleasant young lady, slender in stature, healthy, and well able to carry a baby to delivery without an undue burden." The trial court judge, in attempting to balance Mr. Smith's "feelings" against Ms. Doe's reasons for not wanting to become a mother at this point in time, could rely on nothing more than his own purely subjective observations and personal beliefs.

A case-by-case judicial inquiry into these types of disputes not only undermines the bodily security and liberty interests guaranteed to women by the Constitution, but also presents courts with the impossible task of resolving countless highly personal disputes involving abortion, sterilization, and the use of birth control, between spouses and lovers. Moreover, allowing for case-by-case determinations of who may have an abortion permits any man claiming paternity to force a woman to appear in court to publicly defend, under cross-examination and before hostile witnesses, her private decision to terminate an unwanted pregnancy. Such proceedings violate a woman's

constitutionally protected right of privacy and, at best, impose unjustified and health-threatening delays on her ability to obtain an abortion. *See Akron*, 462 U.S. at 450.

B. Indiana Has Never Even Asserted That It Has A Compelling State Interest In Providing Men The Opportunity To Seek A Court Order Requiring A Woman To Carry A Pregnancy To Term

Mr. Smith contends that Indiana "has an interest in protecting the interests of fathers in their unborn children." Pet. 8-9. However, no Indiana statute purports to grant the relief sought by Mr. Smith and the state has not participated in this case.[5] *See Conn v. Conn*, 525 N.E.2d 612, 615-16 (Ind. Ct. App.) (noting that "Indiana has no statute proscribing abortion in the first trimester, nor does it have a statute requiring spousal consent," and rejecting the husband's argument for a case-by-case balancing of each spouse's interests as invalid and "based on some nebulous common law concept"), *aff'd & opinion adopted*, 526 N.E.2d 958 (Ind.), *applications for stay denied*, No. A-88-55 (U.S. July 22, 1988) (letter from the Clerk of the Court), *cert. denied*, 57 U.S.L.W. 3347 (U.S. Nov. 14, 1988) (No. 88-347).

Indiana has unfailingly accepted this Court's decisions in *Roe* and *Danforth*, and has refused to legitimate the interests asserted by Mr. Smith. *See Conn v. Conn*, 525 N.E.2d at 615-16 ("the decisions in *Roe* and *Danforth* have been mentioned uncritically in the following Indiana cases: [*Razo v. State*, 431 N.E.2d 550 (Ind. Ct. App. 1982); *Indiana Hosp. Licensing Council v. Women's Pavilion of South Bend, Inc.*, 420 N.E.2d

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5 Mr. Smith's contention of Indiana's interest is based on a theory that human life begins at conception, so that a fetus is a "child" and a man who has fertilized a woman's ovum is a "father." Yet this Court in *Roe* explicitly rejected such an effort to enshrine a particular theory of life as state law. *See Roe v. Wade*, 410 U.S. at 159-62; see also *Akron*, 462 U.S. at 444 ("a state may not adopt one theory of when life begins to justify its regulation of abortions"). The state of Indiana has not adopted Mr. Smith's theory of when life begins, but even if it had, such a law would be plainly unconstitutional and thus unavailable to Mr. Smith to support his claims.

1301 (Ind. Ct. App. 1981); *Unwed Father v. Unwed Mother*, 177 Ind. App. 237, 379 N.E.2d 467 (1978)]"); *see also Jane Doe v. John Smith*, No. 84A01-8804-CV-00112 (Ind. Ct. App. Oct. 24, 1988), *petition for cert. filed*, May 10, 1989 (No. 88-1837); *John Doe v. Jane Smith*, 527 N.E.2d 177 (Ind. 1988), *applications for stay denied*, 108 S. Ct. 2136 (1988) (Stevens, J., in chambers), No. A-88-55 (U.S. July 22, 1988) (White, J.) (letter from Clerk of the Court). Indiana has a compelling interest in preserving and protecting the lives and health of pregnant women and protecting the constitutional rights of its citizens. *See Roe*, 410 U.S. at 162. There is no reason to believe that the state would seek to promote the interest asserted by Mr. Smith at the expense of Ms. Doe's right to life and liberty.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

STATE OF INDIANA
VIGO CIRCUIT COURT
JUVENILE DIVISION—1988 TERM
Cause No. 84CO1-8804-JP-185
Filed April 4, 1988

IN THE MATTER OF THE UNBORN CHILD DOE*

TEMPORARY RESTRAINING ORDER

Based upon Petitioner's verified Petition, and Motion for Temporary Restraining Order, and good cause appearing, it is hereby Ordered:

1. The Respondent, Jane Doe, is ordered to not have an abortion performed to terminate the child she is carrying.

2. This Temporary Restraining Order has been issued without prior notice to the Respondent for the reason that this Court has determined, on the basis of the Petitioner's Verified Petition, and Motion, copies of which were served upon Respondent with this Order, that irrepairable [sic] loss and injury would be suffered by Petitioner before notice could be served and a hearing scheduled.

3. The Court further orders any abortion clinic, abortion facility, employee thereof, and any physician to restrain from performing an abortion upon Jane Doe upon receiving notice of this Restraining Order.

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* The pseudonyms Jane Doe and John Smith are substituted for the parties' real names and previous pseudonyms as approved by the Indiana Court of Appeals. See Respondent's Brief in Opposition, 1, n. 1.

4. This Temporary Restraining Order shall expire on April 14, 1988, at 12:01 P.M.

By the Court

/s/ ROBERT HOWARD BROWN
Circuit Court Judge

ORDER TO SHOW CAUSE

To the Respondent:

You are hereby ordered to appear before the Honorable Judge of the above entitled Court on the 7th day of April, 1988, at the hour of 10:30 A.M., or as soon thereafter as counsel may be heard, then and there to show cause, if any there be, the Temporary Order restraining Respondent from having an abortion should not be made permanent.

DATED THIS 4th day of April, 1988.

By the Court

/s/ ROBERT HOWARD BROWN
Circuit Court Judge

STATE OF INDIANA
VIGO CIRCUIT COURT
JUVENILE DIVISION—1988 TERM
No. 84CO1-8804-JP-185

IN THE MATTER OF THE UNBORN CHILD DOE

ORDER

Comes now petitioner, John Smith, by co-counsel, and moves the Court to Order Production of Documents by a Non-party, Dr. Ramon R. Contreras, and the Court having considered the same, now orders Dr. Ramon R. Contreras to provide to petitioner, John Smith and his attorneys, James Bopp, Jr., BRAMES, MCCORMICK, BOPP & ABEL, and Dennis H. Stark, FLESCHNER, FLESCHNER, TANOOS, STARK & NEWLIN, documents as follows:

1. True and accurate copies of all medical records in his possession concerning the respondent, Jane Doe.

2. A signed affidavit summarizing his testimony herein concerning the issues raised by this paternity action, the pregnancy of respondent, and any proposed termination of said pregnancy.

3. The above documents are to be provided to co-counsel for petitioner this 5th day of April, 1988.

/s/ ROBERT HOWARD BROWN
Judge, Vigo Circuit Court

IN THE

SUPREME COURT OF INDIANA

No. 88A01-8804-CV-112

Filed Apri 13, 1988

JANE DOE

Defendant-Appellant,

—v.—

JOHN SMITH

Plaintiff-Appellee.

Appeal from the Vigo Circuit Court, Juvenile Division. Cause Caption, "In The Matter of Unborn Child H.," Cause No. 84CO1 8804 JP 185. The Honorable Robert H. Brown, *Circuit Judge*.

NOTICE TO THE COURT

Jane Doe, by counsel, notifies the Court of an inaccuracy in her "Verified Petition for Emergency Appeal," filed April 11, 1988, and her desire to correct the same. This cause is not of an immediate emergency nature as she is not presently pregnant.

In explanation, she wanted to express to the Court the intimate and private nature of her decision to terminate her pregnancy. Faced with the decision of continuing with an unwanted pregnancy and with violating a court order, she made the decision she felt was right. She arrived at the decision to terminate her pregnancy after consultation with her family and her physician. She did what she had to do to protect both her physical and emotional health.

Because of her action to terminate her pregnancy, there is no longer an immediate health threat to Jane Doe by delay in this suit. However, because of potential sanctions against her, and because this case concerns pregnancy and abortion and as such is uniquely "capable of repetition yet evading review," it is not moot. *Roe v. Wade*, 410 U.S. 113 (1973). Jane Doe asserts that the order enjoining her from seeking medical services to terminate her first trimester pregnancy was transparently invalid and wholly outside the Circuit Court's jurisdiction.

The case still presents a matter of great public importance, and, indeed, of an emergency nature to other women, because the uncorrected order of the Circuit Court invites it and other Indiana courts to engage in the same pernicious and impermissible inquiry into, and overruling of, a competent adult woman's decision to terminate her first trimester pregnancy. Not only does the very nature of the inquiry violate a woman's constitutional right to privacy in this decision-making process, but the delay necessarily occasioned by such a procedure impermissibly burdens a woman's freedom of choice. It has already been ten days since Jane Doe was enjoined from exercising her private choice.

Jane Doe still requests that this Court assume jurisdiction of the case and determine the legal issues presented. Furthermore, because of the changed circumstances, Jane Doe requests an additional ten days to submit supplemental briefs on the substantive and mootness issues.

Respectfully submitted,

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Attorney for Jane Doe

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Certificate of Service

I certify that the foregoing was read by me over the telephone to the following attorney for John Smith on Wednesday morning, April 13, 1988. A copy has also been sent to him by U.S. mail, postage prepaid, this 13th day of April, 1988:

James Bopp, Jr.
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/s/ RICHARD A. WAPLES
Richard A. Waples

FILED
JUN 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1837

IN THE

Supreme Court of the United States

October Term, 1988

JOHN SMITH, *Petitioner*,

v.

JANE DOE, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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No. 88-1837

IN THE

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JOHN SMITH, *Petitioner,*

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JANE DOE, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Petitioner John Smith [the "Father" herein] submits this brief in reply to Respondent's [the "Mother" herein] Brief in Oppostition to the granting of a writ of certiorari in this case. The Father urges again the granting of a writ of certiorari for the reason that this is a matter of great public importance affecting a great number of people and for the reason that the principles of law set forth in the arguments of counsel for the Mother do not preclude the granting of a writ to review the action of the lower court in this case. This brief will focus primarily on the Mother's erroneous assertion that the State of Indiana has asserted no interest herein, but certain other errors should be briefly noted preliminarily.

First, in Respondent's Counterstatement of Question Presented, she refers to a "motion by a man *claiming* to have caused the woman's pregnancy." R.B. i (emphasis added).[1] This is a misleading statement of the facts. The trial court explicitly *found* in its Findings of Fact that John Smith *is* the father of the unborn child of Jane Doe in the paternity action.

Second, counsel for the Mother allege that "[t]he court relied solely on Mr. Smith's testimony in making the unsubstantiated finding" of the reasons why the Mother desired an abortion and that the trial court relied "on nothing more than his own purely subjective observations and personal beliefs" in "attempting to balance" the competing interests. R.B. 4, 8. This is not a fair characterization of the record, as other testimony on the issue of the Mother's reasons for seeking an abortion was given by Witness A, R. 99, and Witness B, R. 109.[2] Moreover, the trial court received uncontroverted testimony from the Father concerning reasons why the Mother desired an abortion in a judicial hearing at which the finder of fact was able to observe the demeanor of the witness. Counsel for the Mother seek to have this Court reweigh the evidence and thereby disregard the Trial Court's Findings of Fact without any showing that there was not substantial evidence to support them. Rather, the Mother resorts to statements based on only a part of the record in an attempt to confuse this Court as to the facts of this case.[3]

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[1]References to documents in this case will employ the following abbreviations: the record is R.; Respondent's Brief in Opposition is R.B.; the Appendix to the Petition for a Writ of Certiorari is P.A.

[2]For the sake of anonymity, witnesses will be identified by letter in the order in which they testified.

[3]Counsel for the Mother also assert that "[t]here is no reason to believe that the state would seek to promote the interest asserted by Mr. Smith at the expense of Ms. Doe's right to life and liberty." R.B. 10. While *Roe v. Wade*, 410 U.S. 113 (1973), recognized a liberty interest in abortion, there is no evidence in the record that the Mother's life was at risk. An appeal to her right to life, therefore, is inappropriate.

Third, counsel for the Mother argue that testimony concerning the sexual activity of the Father and the Mother was inappropriate and amounted to a violation of the Mother's right of privacy. R.B. 4. The hearing, at which this testimony was given, was closed by law and the record sealed. Such testimony is standard fare in paternity actions, wherein paternity is often established on the basis that the couple engaged in sexual intercourse at the time when conception probably occurred. *H.W.K. v. M.A.G.*, 426 N.E.2d 129 (Ind. App. 1981).

The ramification of the Mother's claim that testimony regarding sexual activity in paternity cases is forbidden by the right of privacy is grave. Paternity actions would virtually cease to exist. Millions of women, seeking to establish paternity and gain support for their offspring, would be barred from eliciting testimony of sexual intercourse with the putative father and, thus, would be prevented from establishing paternity. While Indiana provides for a father to bring a paternity suit to establish paternity, as was done in this case, the vast majority of paternity actions are brought by women. Under the Mother's scheme of barring testimony as to sexual intimacies — on alleged privacy grounds — those primarily penalized would be women and children.

Fourth, counsel for the Mother assert that *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), control this case. As this has already been adequately dealt with in the Father's Petition for Certiorari, the arguments will not be repeated here.

I. THE STATE OF INDIANA HAS ASSERTED ITS INTEREST IN PROTECTING THE INTERESTS OF FATHERS IN THEIR UNBORN CHILDREN, ALTHOUGH SUBSTANTIVE DUE PROCESS ANALYSIS REQUIRES ONLY THAT THERE BE A COMPELLING INTEREST, NOT THAT THE STATE ASSERT IT IN ANY PARTICULAR FASHION.

A. THE STATE OF INDIANA HAS ACTED THROUGH ITS COURTS TO PROTECT THE INTERESTS OF FATHERS IN THEIR UNBORN CHILDREN.

Counsel for the Mother allege that "Indiana has never even asserted" its interest in protecting the interests of fathers in their unborn children. R.B. 9.

By this assertion, opposing counsel have placed themselves on the horns of a dilemma. If Indiana has not acted to protect the interests of fathers in their unborn children, then no state action exists and the Mother's Fourteenth Amendment right may not be asserted against the trial court's injunction, as she has done in seeking to shield herself behind *Roe*. If *Roe* is applicable in any way, it is only because the State of Indiana has acted through its courts. Because counsel for the Mother insist that *Roe* controls this case, they logically have conceded that the State of Indiana has acted to protect the interests of fathers in their unborn children.

Ironically, counsel for the Mother have already argued this point themselves. In their brief before the Indiana Court of Appeals, they included an extended discussion entitled, "The Juvenile Court's Order Is State Action." Brief of Appellant at 45-50. In that brief, counsel for the Mother declared:

> It makes no difference whether the operative state actor is the legislature, the executive or the judiciary. 'A State acts by its legislature, its executive, or its judicial authorities. It can act in no other way.' *Ex Parte Virginia* (1880), 100 U.S. 339, 347, *quoted in*, *Shelley v. Kramer* (1948), 334 U.S. 1, 14. The federal constitutional right of the woman is well established, and any infringement of the right by a state actor, including a judge, is state action and actionable as a violation of the Constitution.
>
> As Professor Tribe has explained, '[t]he general proposition that common law is state action — that is, that the state "acts" when its courts create and enforce common law rules — is hardly controversial.[.]' *American Constitutional Law*, [*sic*] 1711 (2d ed. 1988).

Id. at 45-46.

Now counsel for the Mother seem to argue that the action of a legislature is state action but the action of a state court is not. They assert that, because an Indiana court has acted on behalf of the State to protect the interests of a father in his unborn children but the General Assembly has not done so by statute, the State has not asserted its interest in protecting the interests of fathers of unborn children. This assertion is absurd.

Moreover, it is erroneous that the Indiana General Assembly and the Indiana appellate courts have supported *Roe* and its progeny as a matter of state policy. Counsel for the Mother have presented Indiana's compliance with the dictates of this Court, in its abortion cases, as evidence of Indiana's support for abortion on demand and disregard for the interests of fathers whose children are endangered by an abortion decision. R.B.9-10.

The Indiana General Assembly in Acts 1973, P.L. 322, from which Indiana's current abortion statute, Ind. Code. Ann. §35-1-58.5-1 to 8 (West 1986), is derived contained the following statement:

> It is not the intent of the Indiana General Assembly, in enacting this legislation, to acknowledge that there is a constitutional right to abortion on demand or to indicate that it approves of abortion, except to save the life of the mother. The General Assembly is, however, controlled to a certain extent by recent Supreme Court decisions and this legislation is an attempt to abide by those decisions to the extent necessary.
>
> . . . .
>
> No individual may be permitted an abortion when the interest of that individual is outweighed by the express interests of the state in protecting the potentiality of human life.

This provision was explicitly saved from repeal by Ind. Code. Ann. §1-1-1-2 (West 1986), when prior sections of the Indiana law were repealed pursuant to ongoing statutory revision.

It is clear, then, that the Indiana General Assembly has *not* "unfailingly accepted this Court's decisions in *Roe* and *Danforth*," as counsel for the Mother insists. R.B. 9. Rather, the Indiana General Assembly clearly expressed its sense of obligation to follow *Roe* despite its disapproval of that decision. Further, the General Assembly has expressed its determination to deny abortions, where possible, when the rights of the mother are "outweighed" by the State's interests in unborn human life.

Nor may it be said that the state appellate courts have endorsed *Roe* in any way. If they have "unfailingly" followed *Roe*, it is because of their respect for the precedents of this Court and not because of any state policy of supporting abortion or denying protection for the interests of fathers in their unborn children. The Indiana appellate court, in the present case, P.A. 1a-3a, merely followed the Indiana Supreme Court's holdings in *Conn v. Conn*, 525 N.E.2d 612 (Ind. 1988), *aff'd and opinion of app. ct. adopted by order*, No. 73S01-8807-CV-631 (Ind. July 15, 1988), *cert. denied*, 57 U.S.L.W. 3347 (U.S. Nov. 14, 1988) (No. 88-347) (dissent of Pivarnik, J., published at 526 N.E. 2d 958 (Ind. 1988)), and *John Doe v. Jane Smith*, 527 N.E.2d 177 (Ind. 1988). The *John Doe* case relied on the Indiana Supreme Court's holding in *Conn*, which in turn relied solely on federal constitutional law. This may be seen from the following quotation from the opinion in that case:

> Dispositive of this case are the decisions of the Supreme Court of the United States in *Roe v. Wade* . . . and *Planned Parenthood of Central Missouri v. Danforth*. . . .
>
> . . . .
>
> Pursuant to the express holding in *Danforth*, we hold that [the father] has no right to veto [the mother's] decision to obtain an abortion. . . .

Conn, 525 N.E.2d at 613, 616 (citations omitted).

However, the Indiana Supreme Court — while feeling bound by *Roe* — has itself rejected the proposition that a right to

abortion is constitutionally mandated. This was made clear by the Indiana Supreme Court in the case of *Cheany v. State*, 259 Ind. 138, 285 N.E.2d 265 (1972), which rejected a claim that the Indiana Abortion Law, which allowed abortion only to save a life of the mother, was unconstitutional because of a federal constitutional "fundamental right to privacy which includes the woman's right to decide whether to bear an unquickened fetus." *Id.* at 266-67. The Indiana Supreme Court held "that a State interest in what is, at the very least, from the moment of conception a living being and potential human life, is both valid and compelling." *Id.* at 267.

B. SUBSTANTIVE DUE PROCESS ANALYSIS REQUIRES ONLY THAT THERE BE A COMPELLING INTEREST, NOT THAT THE STATE ASSERT IT IN ANY PARTICULAR FASHION.

Given that the State of Indiana has acted through its courts to protect the interests of fathers in their unborn children, the next step of a substantive due process analysis is to determine whether a sufficiently compelling interest exists to allow the state action to pass constitutional muster. Counsel for the Mother attempt to confound this analysis by requiring that the compelling state interest be asserted by the State in only a certain manner — legislatively — and that this legislative assertion of a compelling state interest be done in advance of any constitutional defense of state action before a tribunal. This is not the law.

The case of *Palmore v. Sidoti*, 466 U.S. 429 (1984), demonstrates that a state court may assert the interests of a state in a manner sufficient for review by this Court. In *Palmore*, a Florida trial court removed a child from her divorced mother, who had cohabited with and then married a black man, and granted custody of the child to the child's biological father, the former husband of the mother. The trial court gave as its reason for the change of custody the "social stigmatization" which the child would suffer as a result of living in such an interracial household. *Id.* at 431. The Florida Court of Appeal affirmed.

This Court reversed the holding of the Florida Court of Appeal as a violation of the Equal Protection Clause of the United States Constitution. *Id.* at 433. Because this Court decided the matter on equal protection principles, it did not reach or resolve the substantive due process claim asserted. *Id.* at 433 n.2. However, the principle applicable in the case at bar is the same under ~~either~~ theory, namely, that this Court will consider state interests in a constitutional rights analysis where only a state court has acted.

The *Palmore* Court first noted that there was state action: "The actions of state courts and judicial officers in their official capacity have long been held to be state action governed by the Fourteenth Amendment." *Id.* at 432 n.1 (citations omitted). This Court then proceeded to analyze the "substantial governmental interest" of the state in granting custody based on the best interests of the child. *Id.* at 433.

For present purposes, three crucial comparisons between *Palmore* and the case at bar should be noted. First, in *Palmore* the State of Florida was not involved in the case, just as the State of Indiana has not chosen to intervene in the present case. Second, in *Palmore* the trial court acted pursuant to a general custody statute, providing for custody determination based on the best interests of the child. The statute did not expressly authorize custody determinations based on racial stigma, so that the actual state action under review was that of the trial court, and not the legislature, although the trial court was acting under authority of a generally applicable state statute. Likewise, the trial court in the present case acted pursuant to a general statute authorizing paternity determinations at the initiative of fathers and pursuant to injunctive powers authorized in the statute.[4] As in *Palmore*, the statute

[4]Indiana Code §31-6-6.1-2 and 7 permit an expectant father of an unborn child to file an action to establish his paternity. Further, Indiana Code §31-6-7-14(a)(1) provides:

> Upon its motion or upon the motion of the child, the child's parent, guardian, custodian, or guardian *at litem*, . . . or any person providing

did not expressly authorize the specific basis for action employed by the trial court, but granted general powers to the court to make determinations "for good cause shown." Third, in *Palmore* this Court did not hesitate to consider the interests of the state in its rights analysis, despite the fact that the state had not intervened and the statute did not expressly encompass consideration of racial stigma. Likewise, in the instant case, this Court should consider the interests which all states have in protecting the interests of fathers in their children as declared by this Court and as recognized generally by Indiana in its paternity statute and in its history of aversion to *Roe* and its progeny. No special form of assertion is required for state interests to be considered by this Court, nor must the assertion be done by any particular state entity. Substantive due process analysis asks not *who* has asserted the interest but *whether* an interest sufficiently compelling exists to support the action of the state actor.

services to the child or his parent, guardian, or custodian, the juvenile court may, for good cause shown upon the record issue an injunction:
(1) to control the conduct of any person in relation to the child. . . .

In deciding this case, the Indiana appellate courts found no flaw with the injunction issued to prevent the abortion under this statute or any state law, but only under their erroneous understanding of *Roe* and its progeny.

CONCLUSION

WHEREFORE, as this case presents a matter of great public importance which affects a great number of persons, and which has been wrongly decided below on the basis of an erroneous interpretation of the decisions of this Court, and the review of which is not precluded by any principles of law argued in Respondent's Brief in Opposition, Petitioner John Smith respectfully requests this Court to issue a writ of certiorari to review the decision of the Indiana Court of Appeals.

Respectfully submitted,

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